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No. 84-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, *ET AL.*,

Appellants

v.

ALVIN HEMME, *ET AL.*,

Appellees

On Appeal from the United States District Court for the Southern District of Illinois

BRIEF OF MARGARET A. PALUCH AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Is a gift tax exemption "allowed" to a donor for purposes of § 2010(c) of the Internal Revenue Code when his gift is included, without exemption, in his estate for purposes of computing the unified estate and gift tax.

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On Appeal from the United States District Court for the Southern District of Illinois

BRIEF OF MARGARET A. PALUCH, EXECUTOR OF THE ESTATE OF CHESTER J. PALUCH, DECEASED AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

The *amicus curiae*, Margaret A. Paluch, submits this brief in support of the appellee taxpayer.[1]

INTEREST OF AMICUS CURIAE

The *amicus curiae*, Margaret A. Paluch, is the executor of the estate of Chester J. Paluch. The *amicus curiae* has filed suit for

[1]The letters in which each of the parties have consented to the filing of the brief have been filed with the Clerk of Court pursuant to Rule 36.2.

the refund of estate tax she had erroneously paid on certain property which was exempt from estate tax under federal law. *Margaret A. Paluch, Executor of the Estate of Chester J. Paluch v. United States of America*, No. 85 C 8153 (N.D. Ill.). After the *amicus curiae* paid the estate tax, Congress passed a law which purported to eliminate the estate tax exemption retroactively. The Government is contesting the *amicus curiae*'s suit for refund on the ground that Congress' retroactive elimination of the exemption is constitutionally permissible.

The instant case involves a statutory transitional rule enacted to reconcile the operation of two different estate and gift tax statutes. It affects a small class of taxpayers who made gifts during a twenty-five day period and died within the subsequent three-year period. The district court held the transitional rule unconstitutional as a retroactive change in the estate and gift tax laws. However, this case, unlike the *amicus curiae*'s suit for refund, does not present a retroactivity issue of constitutional dimension. Indeed, the estate tax here was not assessed until more than two years after the enactment of the statute at issue, and the taxpayer was put on constructive, if not actual, notice of the change of the tax law before he made the gifts in controversy.

The *amicus curiae* is concerned that, because the district court, the Government and the taxpayer have erroneously treated this case as involving the constitutionality of a retroactive tax statute, the Court could inadvertently make an overly broad ruling which could affect her pending suit for refund.[2] Unlike the instant case, the suit for refund filed by the *amicus curiae* involves the

[2]The *amicus curiae* is particularly concerned that this Court will issue an overly broad reversal of the district court's constitutional ruling in reliance on the Government's erroneous assertion in its jurisdictional statement that this case has wide ranging implications regarding Congress' ability to pass any taxing provisions with retroactive effect. (Government's Jurisdictional Statement, p. 10).

retroactive elimination of a long-standing exemption from estate tax, and will present a clear issue concerning Congressional authority to enact retroactive taxes.

The *amicus curiae* is aware of at least two other estate tax refund suits pending in the Northern District of Illinois which involve the same issue as presented in the *Paluch* case—whether Congress may retroactively abrogate an estate tax exemption. *Robert C. Norris, et al.* v. *United States*, No. 85 C 8607 (N.D. Ill.); *George N. Gaynor, et al.* v. *United States*, No. 85 C 8608 (N.D. Ill.). The *amicus curiae* is also aware that there are many other estates throughout the country which are similarly affected by this retroactive legislation and understands that a number of such estates plan to file refund suits. In view of the importance of this issue to a potentially large group of taxpayers, the Court should not unnecessarily address the full range of constitutional issues raised by retroactive estate tax legislation until an appropriate case is before it.

STATEMENT OF THE CASE

This case involves the application of Section 2010(c) of the Internal Revenue Code (the "Code"), enacted as part of the Tax Reform Act of 1976 (the "1976 Act"), to certain gifts made by the decedent on September 28, 1976. The gifts were made several days after the 1976 Act had been passed by both houses of Congress but six days before it was signed into law by the President. The 1976 Act became law on October 4, 1976, and its general provisions were effective with respect to gifts made and decedents dying after December 31, 1976.

The legislation instituted a novel unification of the federal estate and gift taxes. Under prior law the estate and gift taxes

each had a separate rate schedule[3] and a separate specific exemption from tax: $30,000 from gift tax, 26 U.S.C. (1970 ed.) § 2521, and $60,000 from estate tax, 26 U.S.C. (1970 ed.) § 2052. Moreover, the estate tax rate schedule was not cumulative with the gift tax rate schedule, so that a decedent could utilize the lower estate tax brackets even though he had made substantial taxable gifts during his lifetime.

Congress believed that the lower gift tax rates coupled with a specific gift tax exemption favored the wealthy (H.R. Rep. No. 1380, 94th Cong., 2d Sess. 16 (1976)), who could afford to make *inter vivos* transfers. To mitigate this result, the 1976 Act provided for a uniform rate schedule for both types of transfer taxes, so that the two taxes were integrated and cumulative. 26 U.S.C. § 2001(b)(1). In addition, Congress created a single "unified tax credit" to be applied against either or both taxes, as first incurred. 26 U.S.C. § 2010(b), § 2505. The unified credit was conceived, in part, to permit all taxpayers to reap maximum tax benefits, irrespective of their ability to avail themselves of a specific gift tax exemption. H.R. Rep. No. 1380, 94th Cong., 2d Sess. 6 (1976).

In an attempt to facilitate an orderly transition from the old taxation scheme to the new, Congress enacted § 2010(c). Section 2010(c) provides that the unified estate and gift tax credit is to be reduced by 20% of the amount "allowed" as a specific exemption with respect to gifts made during the statutory transitional period, September 8, 1976 to December 31, 1976, the effective date of the Act.

On September 28, 1976, Charles Hirschi made five separate gifts aggregating $45,000 in value. The first $15,000 of those gifts was exempt from federal gift tax under the annual $3,000 per

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[3]Under the prior rate schedule, *inter vivos* gifts were taxed at approximately seventy-five percent of the estate tax rates. *Compare* 26 U.S.C. (1970 ed.) § 2502 (gift tax rate) *with* 26 U.S.C. (1970 ed.) § 2051 (estate tax rate).

donee exclusion. 26 U.S.C. (1976 ed.) § 2503(6).[4] Hirschi applied the full amount of his $30,000 specific exemption against the $30,000 balance, so that no gift tax was assessed. On September 30, Hirschi filed a federal gift tax return reporting the September 28 gifts, and indicating no tax due.

Hirschi died more than two years later, on November 9, 1978. Because the September 28, 1976 gifts were made within three years of Hirschi's death, they were included in his gross estate pursuant to § 2035 of the Code and were reported on his federal estate tax return.[5] Since the estate was in the 34% unified estate/gift tax bracket, the $30,000 gift generated a $10,200 tax. In addition, however, the IRS reduced the unified credit available to Hirschi's estate by $6,000, based on its construction of § 2010(c), thereby increasing the unified estate/gift tax on the $30,000 transfer to $16,200 (an effective aggregate rate of 54%).

The appellees paid the assessed deficiency and filed a claim for refund with the IRS, which was denied. They subsequently initiated this refund suit in the United States District Court for the Southern District of Illinois. They asserted that § 2010(c) may not properly be construed to require reduction of the unified credit where the specific gift tax exemption was claimed against a gift ultimately included in the decedent's gross estate as a gift in contemplation of death. They further argued that, if it were so construed, the provision would be unconstitutional.

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[4]The Economic Recovery Tax Act of 1981, Pub. L. 97-34, § 441(a), 95 Stat. 319, increased the per donee exclusion from $3,000 to $10,000.

[5]Prior to the Tax Reform Act of 1976, gifts made within three years of death were presumptively in contemplation of death. This presumption, however, was rebuttable. 26 U.S.C. (1970 ed.) § 2035. In order to eliminate burdensome litigation regarding a decedent's motivation in making gifts, Congress revised § 2035 to provide that all gifts made within three years of death are included in the gross estate, thereby effectively converting the rebuttable presumption into an irrebuttable presumption for such gifts. 26 U.S.C. (1976 ed.) § 2035. *See* H.R. Rep. No. 1380, 94th Cong., 2d Sess. 12 (1976).

SUMMARY OF ARGUMENT

This case presents the narrow question of whether § 2010(c) of the Internal Revenue Code can be properly applied to the taxpayer in this case. Because Mr. Hirschi's September 28, 1976 gifts were later found to be in contemplation of death, the application of § 2010(c) to his estate would impose a double tax burden on those gifts. They would be taxed once as part of his gross estate pursuant to § 2035, and effectively taxed a second time by the reduction of his unified credit pursuant to § 2010(c). Congress did not intend such a result.

Section 2010(c) provides for the reduction of the unified estate/gift tax credit by 20% of the specific gift tax exemption "allowed" for gifts made during the transitional period. Whether Mr. Hirschi's unified estate/gift tax credit should be so reduced therefore turns on whether he was "allowed" a tax exemption for the gifts he made in September, 1976. The *amicus curiae* submits that Mr. Hirschi was not allowed an exemption for such gifts because they were, in fact, included in his taxable estate as transfers made within three years of death. (26 U.S.C. § 2035). Indeed, $10,200 of the unified tax assessed at his death was attributable to the inclusion in his taxable estate of the $30,000 of gifts for which he had claimed a gift tax exemption.

The Government's argument that the gift tax exemption was allowed to Hirschi elevates form over substance. It also flies in the face of the general Congressional intent to integrate the estate tax with the gift tax and the specific Congressional intent to reduce a decedent's unified estate and gift tax credit only where the decedent had "benefited" from a specific exemption claimed during the transitional period. In view of the fact that the gifts in question were indisputably subjected to the unified estate *and gift* tax at Hirschi's death as if such gifts had never been made, it is patent that Hirschi did not benefit in any sense of the word from claiming the specific gift tax exemption. It can hardly be main-

tained that a gift tax exemption was actually allowed for a gift when its full value is included—without exemption—in the donor's gross estate for purposes of calculating the unified estate and gift tax.

The *amicus curiae*, therefore, urges the Court to affirm the district court's decision on the ground that the specific gift tax exemption was not ultimately "allowed" to Hirschi within the meaning of § 2010(c).

If the Court does not affirm on statutory interpretation grounds, the *amicus curiae* does not believe that this case presents any substantial problem of retroactivity and urges this Court to decline any invitation to attempt to decide in this case all the circumstances under which tax laws can operate retroactively. Here, the absence of a substantial constitutional question is established by the fact that the taxpayer's complaint that § 2010(c) imposes a double tax penalty would equally exist if Hirschi had made his gifts *after* the 1976 Act was signed into law, rather than 6 days before, and that *less* tax was imposed under the 1976 Act than would have been under the predecessor law. Thus, what the taxpayer finds objectionable is not really the retroactivity of the statute but rather the impact of the Government's discriminatory construction.

ARGUMENT

I. SECTION 2010(c) SHOULD NOT BE INTERPRETED TO REDUCE THE UNIFIED ESTATE/GIFT TAX CREDIT AVAILABLE TO THE HIRSCHI ESTATE

Although the district court found that § 2010(c) violates the Due Process Clause of the Fifth Amendment, it is unnecessary for the Court to reach that constitutional issue. Properly interpreted, § 2010(c) does not require a reduction in the unified estate/gift tax credit based on a specific exemption claimed by a decedent against a gift which is later included in his gross estate. The Court should therefore affirm the district court's decision on statutory

interpretation grounds, and avoid needless adjudication of an important constitutional issue. *See Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 498 (1941).

Section 2010(c) provides:

> The amount of the [unified] credit allowable under subsection (a) shall be reduced by an amount equal to 20 percent of the aggregate amount *allowed* as a specific exemption under Section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the decedent after September 8, 1976. 26 U.S.C. (1976 ed.) § 2010(c) (emphasis added).

Thus, whether Hirschi's unified credit should be so reduced hinges on whether he was "allowed" the specific gift tax exemption within the intendment of § 2010(c).

In a technical sense, one might argue, as the Government does, that the exemption was "allowed" to Hirschi simply because he claimed it on his gift tax return reporting the September, 1976 gifts. (Government Br. 13–17). Such a definition, however, elevates form over substance because it ignores the reality that the gifts were, in fact, returned to Hirschi's taxable estate as if they had never been made. No exemption was allowed for the gifts for purposes of calculating the unified estate and gift tax, and as a result, the estate paid $10,200 of additional tax.

At the risk of sounding redundant, the *amicus curiae* submits that the true test for determining whether an exemption has been allowed for certain property is whether such property was in fact exempted from tax. Here, the gifts in question were fully subjected to the unified estate *and gift* tax. Accordingly, it can hardly be claimed that any exemption was "allowed" to Hirschi for the gifts which he made in September, 1976. Any exemption he claimed for the gifts turned out to be illusory, for the property was ultimately taxed just as if he had never given it away.

The objective of § 2010(c), as the Government acknowledges in its brief, is to avoid giving taxpayers who make gifts during the

transitional period a "double tax benefit in the form of a $30,000 specific exemption under the old regime coupled with an undiminished unified credit under the new." (Government Br. 8). *See Estate of Gawne* v. *Commissioner*, 80 T.C. 478, 483 (1983); R. Stephens, G. Maxfield & S. Lind, *Federal Estate and Gift Taxation* ¶ 3.02, at 304, p. 9 (5th ed. 1983). A taxpayer can have one or the other, but not both. However, under the Government's construction of the transitional rule, Hirschi would have neither. In addition to paying a $10,200 unified tax on the $30,000 in gifts (34% x $30,000), the Hirschi estate would suffer the penalty of a $6,000 reduction in its unified credit, so that the total tax on the $30,000 transfer would be $16,200.

Without the transitional rule, a taxpayer who made a $30,000 gift between September 8 and December 31 of 1976 could receive a $30,000 specific exemption under the old law and an undiminished unified credit under the new law. Because of publicity concerning the passage of the 1976 Act, it is likely that many taxpayers would have taken advantage of this "gap" between the provisions of the old and the new law. The purpose of Congress in enacting § 2010(c) was to impose a 20% "tax" on any gifts allowed a specific exemption under the old law, which would otherwise escape taxation (through an undiminished unified credit under the new law). The 20% rate approximated the average gift tax rate under prior law. Congress could not have intended that a taxpayer would pay both the 20% tax and a full tax on the same gift under the new law.

The transitional rule was clearly intended to provide an equitable reduction in the unified credit commensurate with any specific exemption allowed for gifts made during the transitional period, thereby roughly equalizing the tax liability of persons making gifts before and after the effective date of the 1976 Act. The reduction of a decedent's unified credit for an exemption claimed against a gift in contemplation of death in no way furthers this purpose and indeed undermines it. Even in the ab-

sence of the transitional rule, such gifts would be included in the donor's gross estate for purposes of computing the unified tax, so it would be impossible for such a donor to reap a "double tax benefit." Indeed such a gift is effectively treated as if it were never made for estate tax purposes. It is therefore irrational to assume that Congress intended the transitional rule to apply to gifts in contemplation of death.

In contrast to Hirschi, a donor who made the same gifts but had the good fortune of surviving for at least three years would cause his estate to incur only $6,000 of unified tax, which is the 20% tax Congress intended to impose on transitional period gifts. Wholly apart from the inequities of "human mortality" (Government Br. 17), there is something fundamentally unjust and unfair about a tax which treats the two situations so unequally. And the legislative history of the 1976 Act and the underlying Congressional intent in integrating the estate tax with the gift tax indicate that such a construction is plainly wrong.

As the Government brief points out, the House Ways and Means Committee referred to the transitional rule in its Report on H.R. 14844. (Government Br. 7–8). Its explanation of the transitional rule was incorporated by reference in the Conference Committee Report on the 1976 Act. *See* Sen. Rep. No. 1236, 94th Cong., 2d Sess. 607 (1976). The Committee stated:

> As a transitional rule, the unified credit is to be reduced by an amount equal to 20 percent of the amount allowed as a specific exemption in computing taxable gifts under the present law. Thus, in the case where a donor had *benefited* from the use of the full $30,000 gift tax specific exemption under present law, the maximum unified credit would be reduced by $6,000. (Emphasis added.)

H.R. Rep. No. 1380, 94th Cong., 2d Sess. 16 (1976). Thus, the legislative history of § 2010(c) suggests that a decedent should lose a portion of his unified credit only where he benefits from his use of the specific exemption. A decedent, like Hirschi, who claimed a specific exemption for a gift made within three years

prior to his death, derives no benefit from that exemption and indeed the exemption is effectively disallowed when the gift is included in his gross estate. Clearly, Hirschi "has not benefited from the use of the full $30,000 gift tax exemption" (H.R. Rep. No. 1380, 94th Cong., 2d Sess. 16 (1976)) because the gifts for which such exemption was claimed were thrown back into his estate at his death and taxed as if he had never made them.

Where latent ambiguities in the language of a statute exist, the Court has cautioned that "literalness can strangle meaning." *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962), quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946). It has repeatedly warned against an approach to statutory construction which confines itself to the bare words of a statute. *See, e.g., Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459-462 (1892); *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945); *Lynch*, 369 U.S. at 711, 715. Accordingly, it has rejected a literal meaning when it would not be consonant with the purposes of the Act. *Lynch, supra*, 369 U.S. at 710; *Haggar Co.* v. *Helvering*, 308 U.S. 389, 399 (1940).[6]

Further, the Court has held that, "taxation is an intensely practical matter and laws in respect of it should be construed with a view to avoiding, so far as possible, unjust and oppressive consequences." *Farmers Loan Co.* v. *Minnesota*, 280 U.S. 204, 212 (1929). The Government's construction would result in such unjust and oppressive consequences and, accordingly, should be rejected.

The legislative history and design of the 1976 Act mandate that any ambiguity inherent in § 2010(c) must be resolved in favor of the taxpayer. The undeniable effect of the Government's construction of § 2010(c) is to subject Hirschi's gift to multiple transfer

[6]In *Haggar*, the Court refused to interpret § 215 of the National Industrial Recovery Act literally to preclude a timely amendment of a tax return, on the theory that such an interpretation would be inconsistent with the clear statutory purpose. *Haggar*, 308 U.S. at 393-94.

taxation under the 1976 Act. Such gifts are taxed once as a reduction in the unified estate and gift tax credit that his estate can claim, and taxed again as a portion of his taxable estate. Congress clearly did not intend such a result. Not only would such construction undermine the unified transfer taxation scheme that Congress sought to institute through the Act, but it would also conflict with its affirmative efforts to assure that *inter vivos* gifts returned to the gross estate would not be taken into account more than once for transfer tax purposes.

The Court, in construing the language of § 2010(c), must " 'find the interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.' " *Commissioner of Internal Revenue* v. *Engel*, 464 U.S. 206 (1984), quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J. concurring in part and dissenting in part). Congress designed the gift and estate tax provisions of the 1976 Act to effect a unification of the two taxation schemes. It premised the statutory revisions on the theory that "the tax burdens imposed on the same amount of wealth should be substantially the same whether the transfers are made both during life and at death or made only upon death." H.R. Rep. No. 1380, 94th Cong., 2d Sess. 11 (1976).

Pursuant to its clearly articulated goal, Congress instituted a Unified Rate Schedule (26 U.S.C. (1976 ed.) § 2001) to be applied to all property transfers, whether *inter vivos* or testamentary:

> The Congress believed that it was desirable to reduce the disparity of treatment between lifetime and deathtime transfers through the adoption of a single unified estate and gift tax rate schedule providing progressive rates based upon cumulative lifetime and deathtime transfers.

Joint Committee Explanation 526, 1976-3 (Part 1) C.B. 538. It replaced the disparate tax exemptions with a unified credit intended to be used to its full extent by all taxpayers regardless of

the manner in which they disposed of their property. 26 U.S.C. (1976 ed.) § 2010. The House Ways and Means Committee explained the purpose of the credit as follows:

> As a practical matter, the gift tax exemption is not available to individuals who cannot afford to make lifetime transfers. Thus the overall transfer tax exemption is effectively greater for individuals who are financially able to utilize the gift tax exemption through lifetime transfers. Your committee believes it would be more equitable if a unified credit in lieu of an exemption were available on an equal basis without regard to whether the transfers are made only at death or are made both during lifetime and at death.

H.R. Rep. No. 1380, 94th Cong., 2d Sess. 16 (1976). In unifying the estate and gift taxes, Congress intended "to preclude having the same lifetime transfers taken into account more than once for transfer tax purposes." *Id.* at 13.

The Government's interpretation of § 2010(c) is seriously at odds with Congress' effort to integrate federal estate and gift taxation and to avoid duplicative taxation of lifetime transfers. It would subject a narrow class of gifts to excessive taxation in the face of Congress' clear intent to effectuate even-handed taxation of property transfers. In addition, it would obstruct the Congressional effort to afford each and every taxpayer the full advantage of the unified credit. If applied to the Hirschi estate, it would penalize a discrete group of taxpayers—those making gifts in contemplation of death during the transitional period—in a way no other class of taxpayers would be.[7]

The Court should also consider the purpose and effect of other specific provisions of the Act in interpreting the ambiguous

[7]No other class of taxpayers would be similarly disadvantaged. All other taxpayers subject to § 2010(c)—that is, those surviving more than three years after making their gifts—would reap the benefits of their specific exemption, which would equitably offset the reduction in their unified credit. Similarly, all taxpayers making gifts in contemplation of death after the effective date of the act would receive full use of their entire tax credit as insured by the calculations set forth in 26 U.S.C. (1976 ed.) § 2001.

language of § 2010(c). *Richards* v. *United States*, 369 U.S. 1 (1962).[8] Different provisions within an act should be construed, if at all possible, to be harmonious with one another. *See, e.g., Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, 600 F.2d 844 (D.C. Cir. 1979); *National Bank and Trust Co. of South Bend* v. *United States*, 589 F.2d 1298 (7th Cir. 1978). A construction of § 2010(c) which would call for imposing increased unified tax liability on gifts made in contemplation of death directly conflicts with the careful design of other gift and estate tax provisions.

Section 2001, which sets forth the formula by which estate taxes are calculated, was devised precisely to avoid duplicative taxation. H.R. Rep. No. 1380, 94th Cong., 2d. Sess. 13 (1976). It provides that, for purposes of calculating the unified tax, the decedent's "adjusted taxable gifts" are to be aggregated with his taxable estate, but not if such gifts are already included in the taxable estate. 26 U.S.C. (1976 ed.) § 2001(b). This calculation insures that any portion of the unified credit which had previously been claimed for an *inter vivos* gift later deemed in contemplation of death will not reduce the credit that would otherwise have been available to offset estate tax liability. This legislative policy against double taxation of property transfers is further exemplified by the provision allowing a credit against estate tax for gift tax already paid on gifts in contemplation of death.[9] 26 U.S.C. § 2012.

[8] As the Court stated in *Richards*:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole act, and to its object and policy." *Richards*, 369 U.S. at 10-11, quoting *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 285 (1958).

[9] Under neither the old nor the new laws is the taxpayer penalized, except pursuant to § 2010(c), for exemptions taken against gifts in contemplation of death. Under the prior law, if a gift was deemed in con-

(Footnote continued on following page)

Congressional policy against double taxation of gifts in contemplation of death is further manifested in the specific Code provisions respecting such transfers. The clear purpose of requiring that such gifts be returned to the gross estate is to treat and tax them as if they were testamentary transfers. Gifts in contemplation of death "are motivated by the same considerations as lead to testamentary dispositions of property, and [are] made as substitutions for such dispositions without awaiting death. . . ." *Milliken* v. *United States*, 283 U.S. 15, 23 (1931). It is clearly equitable, therefore, that they should be taxed as testamentary. These considerations of equity, however, are completely undermined by effectively taxing such gifts as both *inter vivos* and testamentary transfers.[10]

Finally, this transitional rule, like all other tax measures, is to "be construed liberally in favor of the taxpayers." *Bowers* v. *New York & Albany Co.*, 273 U.S. 346, 350 (1927). All doubts, therefore, should be resolved against the government. *See Shwab* v. *Doyle*, 258 U.S. 529, 536 (1922).[11]

(Footnote continued from previous page)
templation of death, it was returned to the gross estate, and any gift tax paid would be credited against estate tax due. Because the specific gift tax exemption available under the prior law could be claimed for *inter vivos* transfers only, there was no need to compensate for the loss of that credit in assessing the estate tax. Under the new provisions, a credit for previously paid gift tax is permitted for gifts made prior to the effective date of the Act. 26 U.S.C. (1976 ed.) § 2012(e). For gifts made after that date, the tax calculation formula of § 2001 factors in the loss of unified credit on gifts returned to the gross estate.

[10]In addition, if Congress had intended to so drastically alter the tax consequences attaching to gifts in contemplation of death, it would have done so by enacting legislation affecting all such gifts, not merely gifts made over a specific four-month period. Congress did indeed amend § 2035, governing gifts in contemplation of death, by removing the rebuttable presumption and substituting an irrebuttable inclusion of such gifts. It is notable that the amended provision made no reference whatsoever to increasing the tax liability for those gifts.

[11]The government has placed great reliance on the United States Court of Claims decision in *Renick* v. *United States*, 687 F.2d 371 (Ct.

(footnote continued on next page)

II. SECTION 2010(C) DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

While the district court's judgment can and should be affirmed on statutory grounds, the taxpayer has also urged that if this Court accepts the Government's construction of § 2010(c), it should affirm the district court's finding that the provision is an unconstitutional retroactive tax. The *amicus curiae* disagrees and urges the Court here to decline any invitations to address the circumstances under which tax laws can be applied retroactively. While the Fifth Amendment undeniably restricts Congress' ability to impose a tax retroactively,[12] this case does not present a retroactivity question of constitutional significance. The unfairness inherent in the Government's construction of § 2010(c), of which the taxpayer complains, would exist if the subject gifts had been made six days after the 1976 Act was signed into law, rather than six days before. That the taxpayer is complaining about this discriminatory construction, *not* the retroactivity of the 1976 Act, is confirmed by the fact that the Hirschi estate paid *less* tax under the 1976 Act than it would have under the predecessor law. Moreover, the presence of notice and other pertinent circumstances would appear to foreclose a retroactivity claim in any event.

Because the Constitution exists in large measure to protect substantial reliance interests, the question whether a retroactive tax law can survive constitutional scrutiny depends on a number of factors. A critical inquiry is therefore whether the taxpayer had actual or constructive notice of the change in the law at a time

Cl. 1982). The court in *Renick* held that the unified credit was not "restored" under 2010(c) for gifts in contemplation of death, but ignored the question of whether the exemption was "allowed" for gifts ultimately subjected to the unified estate/gift tax. *Id.* at 377. The *amicus curiae* submits that the court did not consider many of the important factors set forth above, and respectfully disagrees with its conclusion.

[12] *See, e.g., Nichols* v. *Coolidge*, 274 U.S. 531 (1927) (estate tax); *Blodgett* v. *Holden*, 275 U.S. 142 (1920) (gift tax); *Untermyer* v. *Anderson*, 276 U.S. 440 (1928) (gift tax); *Coolidge* v. *Long*, 282 U.S. 582 (1931) (estate tax).

when the penalty could be obviated or avoided. *United States* v. *Darusmont*, 449 U.S. 292 (1981); *Blodgett* v. *Holden*, 275 U.S. 142, 147 (1920); *Untermyer* v. *Anderson*, 276 U.S. 440, 448 (1928). Other considerations may include the length of the period of retroactivity, and the extent to which the new statute penalizes pre-enactment conduct. For example, a law that imposes a transfer tax on previously exempted property has long been held invalid as applied to transfers made long before the change in the law was propounded or enacted. *See, e.g., Nichols* v. *Coolidge*, 274 U.S. 531 (1927); *Coolidge* v. *Long*, 282 U.S. 582 (1931).

In arguing that § 2010(c) is constitutional, the Government has improperly focused on whether § 2010(c) is a "new tax," citing *United States* v. *Milliken*, 283 U.S. 15. (Government Br. 21–24). It has erroneously argued the prior decisions of this Court invalidating retroactive estate and gift taxes have no continued vitality except as applied to totally new types of taxes. (Government Br. 23). While the Government wholly misconstrues the clear import of *Milliken*,[11] this Court need not and should not consider the relevance of *Milliken* to this case. Section 2010(c) simply does not implicate constitutional concerns of retroactivity under any view of the law.

The taxpayer's objection to § 2010(c), viewed in its true light, has nothing to do with the retroactive application of § 2010(c) to Hirschi's previously claimed gift tax exemption. Section 2010(c), as the Government construes it, operates to impose duplicative tax liability on a single property transfer. That liability, however, would occur regardless of whether Hirschi has made the gifts before or after the provision was enacted. It also cannot be doubt-

[11]The estate tax statute considered in *Milliken* merely increased the overall rate of taxation applicable to gifts in contemplation of death. *Id.* at 19. In upholding the law, the Court emphasized that a taxpayer assumes the risk that the rate of taxation may rise where the legislative policy to tax a certain transaction is clearly established. *Id.* at 23. A taxpayer, however, may certainly not be charged with notice that a wholly new penalty will be imposed on a transaction, in complete contravention of pre-existing legislative policy.

ed that the taxpayer would have instituted a refund action in any event. Given the fact that the inequity of the Government's construction of § 2010(c) in no way stems from its retroactive application to Hirschi, this case does not present an appropriate opportunity for the Court to enunciate the parameters of Congressional authority to enact retroactive tax measures.

Further, even taking into consideration the double taxation imposed by § 2010(c), the Hirschi estate tax liability is less than it would have been under the prior laws. The taxpayer can hardly claim that the Hirschi estate has been retroactively deprived of any property in violation of the Fifth Amendment.

Moreover, the fact that Hirschi clearly had actual or constructive notice of the potential adverse tax consequences at all relevant times would diminish, if not foreclose, any retroactivity claim in all events. At the time he made his *inter vivos* gifts on September 28, 1976, the Tax Reform Act had been approved by the Conference Committee and had been passed by both houses of Congress. Six days later, on October 4, the President signed the bill into law. The Court held in *United States v. Darusmont*, 449 U.S. 292 (1981), that even pre-enactment public debate regarding the provisions of the Act provided ample constructive notice to taxpayers of the imminent statutory changes. *Id.* at 299. In addition, the timing of Hirschi's September 28 gift, coupled with the hasty filing of his gift tax return on September 30, create a strong inference that he had actual notice of the transitional rule.

Section 2010(c) was necessary to reconcile the operation of two different statutes during a transitional period, and to prevent taxpayers from reaping a "double benefit" in the transition from the old law to the new law. The "retroactive" injury of which the taxpayer complains is limited to the small class of taxpayers who made gifts between September 8 and October 4, 1976, and who had the misfortune to die within the following three years. Section 2010(c) was merely a mechanism to effect the transition from the old law to the new.

Conclusion

For the foregoing reasons the Court should uphold the district court's decision on the ground that § 2010(c) may not properly be interpreted to apply to the Hirschi estate. If the Court finds it necessary to reach the constitutional issue in this case, it should hold that the statute does not present a substantial constitutional question as to the validity of a retroactive tax measure.

Respectively submitted,

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